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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170222

Ex parte Alabama Surface Mining Commission

PETITION FOR WRIT OF MANDAMUS

(In re: John T. Crane et al.

v.

Alabama Surface Mining Commission and Black Warrior Minerals, Inc.)

(Jefferson Circuit Court, CV-17-900352)

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v.

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(Jefferson Circuit Court, CV-17-900352)

SELLERS, Justice.

The Alabama Surface Mining Commission ("the Commission") and Black Warrior Minerals, Inc. ("Black Warrior"), separately petition this Court for a writ of mandamus directing the Jefferson Circuit Court to dismiss the underlying action seeking judicial review of the Commission's issuance of a surface-coal-mining permit to Black Warrior ("the permit") or, in the alternative, to transfer the action to the Walker Circuit Court. The underlying action was filed by the respondents, John T. Crane, Dan Jett, and Linda Jett ("the property owners"), who own property near the location that is the subject of the permit. We grant the petitions and issue the writs.

Facts and Procedural History

On March 31, 2016, the Commission issued the permit to Black Warrior, authorizing the surface mining of certain land in northern Jefferson County. The property owners appealed the issuance of the permit to the Commission's Division of Hearings and Appeals, and a hearing officer affirmed the issuance. The property owners then filed with the Commission a petition for review of the hearing officer's decision, pursuant to § 9-16-79(1)d., Ala. Code 1975. The Commission took no action on the property owners' petition within 30 days of its filing; thus, the petition was deemed denied pursuant to § 9-16-79(3)a., Ala. Code 1975.

On January 30, 2017, the property owners filed the underlying appeal in the Jefferson Circuit Court challenging the Commission's decision.[1] In response, the Commission and Black Warrior each filed a motion to dismiss or, alternatively, to transfer the appeal to the Walker Circuit Court. After hearing arguments and requesting briefs on the motions, the Jefferson Circuit Court denied the motions filed by the Commission and Black Warrior.

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[1]Section 9-16-79(4)b., Ala. Code 1975, allows a party to "secure a judicial review" of a final decision of the Commission. That action is referred to in this opinion as an "appeal."

The Commission and Black Warrior filed separate petitions for a writ of mandamus with the Court of Civil Appeals challenging the Jefferson Circuit Court's denial of their respective motions for a change of venue. The Court of Civil Appeals denied those petitions, and the Commission and Black Warrior did not file applications for rehearing. See Ex parte Alabama Surface Mining Comm'n, 254 So. 3d 904 (Ala. Civ. App. 2018). The Commission and Black Warrior now each separately have petitioned this Court for a writ of mandamus.

Standard of Review

This Court will issue a writ of mandamus when the petitioner shows a clear legal right to the relief sought; an imperative duty upon the respondent to perform, accompanied by a refusal to do so; the lack of another adequate remedy; and the properly invoked jurisdiction of the court. Ex parte Hampton Ins. Agency, 85 So. 3d 347, 350 (Ala. 2011).

Discussion

These petitions require this Court to determine the proper venue for an appeal of an adverse decision of the Commission. Specifically, we are asked in this case to decide whether the Jefferson Circuit Court is a proper venue for the property owners' appeal or whether the appeal should be

transferred to the Walker Circuit Court pursuant to § 9-16-79(4)b., Ala. Code 1975. In making that determination, we must examine the interaction between the Federal Surface Mining Control and Reclamation Act of 1977 ("the Federal Surface Mining Act"), 30 U.S.C. § 1201 et seq., and the Alabama Surface Mining Control and Reclamation Act of 1981 ("the Alabama Surface Mining Act"), § 9-16-70 et seq., Ala. Code 1975.

The United States Supreme Court's discussion of the Federal Surface Mining Act is instructive:

> "The [Federal] Surface Mining Act is a comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.' § 102(a), 30 U.S.C. § 1202(a) (1976 ed., Supp. III). Title II of the Act, 30 U.S.C. § 1211 (1976 ed., Supp. III), creates the Office of Surface Mining Reclamation and Enforcement (OSM), within the Department of the Interior, and the Secretary of the Interior (Secretary) acting through OSM, is charged with primary responsibility for administering and implementing the Act by promulgating regulations and enforcing its provisions. § 201(c), 30 U.S.C. § 1211(c) (1976 ed., Supp. III). ... Section 501, 30 U.S.C. § 1251 (1976 ed., Supp. III), establishes a two-stage program for the regulation of surface coal mining: an initial, or interim regulatory phase, and a subsequent, permanent phase. ... Under the permanent phase, a regulatory program is to be adopted for each State, mandating compliance with the full panoply of federal performance standards, with enforcement

> responsibility lying with either the State or Federal Government.
>
> "....
>
> "...[A]ny State wishing to assume permanent regulatory authority over the surface coal mining operations on 'non-Federal lands' within its borders must submit a proposed permanent program to the Secretary for his approval. The proposed program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the Act and accompanying regulations, and that the State has the administrative and technical ability to enforce these standards. 30 U.S.C. § 1253 (1976 ed., Supp. III). The Secretary must approve or disapprove each such proposed program in accordance with time schedules and procedures established by §§ 503(b), (c), 30 U.S.C. §§ 1253(b), (c) (1976 ed., Supp. III)."

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268-72 (1981)(footnotes omitted).

The Federal Surface Mining Act adopts a scheme that has been described as "cooperative federalism," whereby the federal government adopts a general regulatory regimen and invites the states to enact legislation complying with the major components of the federal regulatory goals, but reserves to the states the enforcement and overall implementation of Congress's legislative intent. Under the Federal Surface Mining Act, states are allowed to enact a state regulatory program ("state program") controlling surface-mining

operations and submit that state program to the Office of Surface Mining Reclamation and Enforcement ("the OSM") for approval by the Secretary of the Interior.[2] 30 U.S.C. § 1253. A state program does not become effective until it is approved by the Secretary of the Interior. Id. Further, any subsequent "changes to laws or regulations that make up the approved State program" are not effective until they are approved by the Director of the OSM. 30 C.F.R. § 732.17(g).

In accordance with the framework provided by the Federal Surface Mining Act, Alabama created its own state program by enacting the Alabama Surface Mining Act in May 1981. Act No. 81-435, Ala. Acts 1981. Alabama's state program was conditionally approved by the OSM, with an effective date of May 20, 1982. 30 C.F.R. 901.10. Among other things, the Alabama Surface Mining Act created a process for obtaining permits to engage in certain surface-mining operations and a process for challenging the approval or disapproval of those

[2]The OSM "was established as a subdivision within the Department of the Interior with the Secretary of the Interior ..., acting through the OSM, empowered to administer the various state programs for controlling surface coal mining pursuant to" certain provisions of the Federal Surface Mining Act. Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 315 (3d. Cir. 2002). See also 30 U.S.C. § 1211.

surface-mining permits, with a petition for review first being heard by a hearing officer and then by the Commission itself. See generally Act No. 81-435, §§ 8-20, Ala. Acts 1981 (subsequently codified at Ala. Code 1975, §§ 9-16-77 to 9-16-88). Finally, the Alabama Surface Mining Act allowed any aggrieved party to "secure a judicial review of an adverse decision by filing a notice of appeal in circuit court." Ala. Code 1975, § 9-16-79(4)b.

Notably, the Alabama Surface Mining Act, as originally enacted, did not include a provision specifying the proper venue for such an appeal. Caselaw at the time the Alabama Surface Mining Act was enacted generally indicated that the proper venue for actions against a State agency was the county where the agency maintained its principal place of business. See Alabama Youth Servs. Bd. v. Ellis, 350 So. 2d 405, 407 (Ala. 1977); Alabama Alcoholic Beverage Control Bd. v. Owen, 54 Ala. App. 419, 420, 309 So. 2d 459, 460 (1975). However, later in 1981, after the enactment of the Alabama Surface Mining Act, the legislature enacted the Alabama Administrative Procedure Act ("the AAPA"), Ala. Code 1975, § 41-22-1 et seq., which, except for certain provisions not of consequence here, became effective October 1, 1982, a few months after the OSM's

conditional approval of Alabama's state program. See Ala. Code 1975, § 41-22-27. Included in the AAPA are provisions detailing "the procedure for soliciting judicial review of final decisions of administrative agencies within the State." Ex parte Worley, 46 So. 3d 916, 919 (Ala. 2009)(citing Ala. Code 1975, § 41-22-20). The AAPA, at Ala. Code 1975, § 41-22-20(b), generally provides that venue for such judicial proceedings is proper "either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party ... resides." Thus, where applicable, the AAPA modified the general rule that the proper venue for actions against a State agency was in the county where the agency maintained its principal place of business.

In 1983, the legislature amended the Alabama Surface Mining Act, including § 9-16-79, Ala. Code 1975, to state that the procedures in the Alabama Surface Mining Act for hearings and appeals before the Commission "shall take precedence over the Alabama Administrative Procedure Act." See Act No. 1983-774, Ala. Acts 1983. In Ex parte Water Works Board of Birmingham, 177 So. 3d 1167 (Ala. 2014), this Court discussed

whether the 1983 amendment precluded the application of § 41-22-20(b) of the AAPA when determining the proper venue for an appeal brought pursuant to the Alabama Surface Mining Act. That case involved an appeal filed in the Jefferson Circuit Court by the Birmingham Water Works Board challenging the issuance of a permit by the Commission. The Commission filed a motion for a change of venue, arguing that venue was proper only in the Walker Circuit Court. The trial court ordered that the appeal be transferred, citing the general rule that proper venue for an action against a State agency was the county of the agency's principal place of business and noting that the Commission was required by law to maintain its principal office in Walker County.[3] 177 So. 3d at 1169. The Water Works Board petitioned for a writ of mandamus, and this Court granted the petition, holding that the Jefferson Circuit Court was a proper venue for that appeal. 177 So. 3d at 1173. In reaching that conclusion, this Court noted that the Alabama

[3]Under § 9-16-73(h), Ala. Code 1975, the Commission is required to maintain its principal office in Jasper, Alabama, which is located in Walker County. Thus, there was no dispute in that case, and there is none in this case, that the Commission's principal office is located in Walker County. See Ex parte Lucas, 165 So. 3d 618, 620 n.2 (Ala. Civ. App. 2014) (taking judicial notice of the county in which a municipality is located).

Surface Mining Act contained no provision "dictating to which circuit court a party may appeal; in other words, § 9-16-79 lacks a venue provision." 177 So. 3d at 1171. Further, this Court noted that, although the language of § 9-16-79(a)(1) states that "[t]hese procedures shall take precedence over the [AAPA]," it does not "state that the AAPA may not be considered in any circumstance." 177 So. 3d at 1173. Therefore, this Court held that, in light of the lack of a venue provision in the Alabama Surface Mining Act, the AAPA should be consulted to determine if venue in the Jefferson Circuit Court was proper and further held that, under § 41-22-20(b), venue was proper in Jefferson County, where the Water Works Board had its principal office. Id.

Following this Court's decision in Ex parte Water Works Board, the legislature amended § 9-16-79 of the Alabama Surface Mining Act. See Act No. 2015-383, Ala. Acts 2015. The first unnumbered paragraph was amended to provide: "These procedures shall take precedence over the [AAPA], which shall in no respect apply to proceedings arising under this article." Ala. Code 1975, § 9-16-79 (changed language emphasized). Additionally, § 9-16-79(4)b. was amended to specify that the proper venue for a judicial review of a final

decision of the Commission is "in the circuit court of the county in which the commission maintains its principal office." By its own terms, the act amending § 9-16-79(4)b. (hereinafter referred to as "the 2015 amendment") became effective in June 2016, before the property owners filed the underlying appeal. Act No. 2015-383, § 3, Ala. Acts 2015.

Under the plain language of § 9-16-79(4)b., as it now reads, the only proper venue for the property owners' action is the circuit court of Walker County, where the Commission maintains its principal office. The property owners, however, contend that, at the time they commenced their appeal in the Jefferson Circuit Court, the 2015 amendment was not effective and the earlier version of § 9-16-79(4)b. applies.

As noted above, the Federal Surface Mining Act requires that state programs be approved by the Secretary of the Interior. 30 U.S.C. § 1253. Moreover, it requires that the rules and regulations of a state program be consistent with regulations issued by the Secretary pursuant to the Federal Surface Mining Act. 30 U.S.C. § 1253(a)(7). One such regulation, 30 C.F.R. § 732.17, provides a process through which changes or amendments to an already approved state

program may be proposed and approved. 30 C.F.R. § 732.17(g) provides:

> "Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director [of the OSM] as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment."

(Emphasis added.) In reliance on that provision, the property owners argue that the 2015 amendment to the Alabama Surface Mining Act was an amendment to Alabama's approved state program that required approval by the OSM before becoming effective.

Before the 2015 amendment was enacted, it was informally submitted to the OSM to evaluate its consistency "with respect to the Federal requirements," and the OSM "found nothing of concern." After the 2015 amendment was enacted and signed by the Governor, it was again submitted to the OSM with the subject line: "Formal Submission of Amendment to the Alabama Regulatory Program." However, the body of the cover page also stated:

> "This amendment to Alabama Law clarifies that venue for appeals of Alabama Surface Mining decisions resides in the Circuit Court of the county in which the agency maintains its principal office. We

> believe this to be consistent with Section 526(e) of [the Federal Surface Mining Act].
>
> "The effective date of this Act is one year from enactment."

Thereafter, the OSM announced the "receipt of a proposed amendment to the Alabama regulatory program" and called for the submission of written comments on the proposed amendment. Alabama Regulatory Program, 80 Fed. Reg. 60107 (October 5, 2015). At the time the property owners filed their appeal in the Jefferson Circuit Court, the OSM had not taken any further action in regard to the amendment.[4] Thus, the property owners claim that the 2015 amendment had not yet become effective and that the proper venue for their action was governed by the AAPA, specifically § 41-22-20(b), pursuant to this Court's holding in Ex parte Water Works Board of Birmingham.

[4]On April 27, 2018, after these mandamus petitions were filed, the OSM approved the 2015 amendment; specifically, it found that the 2015 amendment "did not make [Alabama's state program's] rules or regulations less effective than, or inconsistent with, the Federal requirements." See Alabama Regulatory Program, 83 Fed. Reg. 18409 (April 27, 2018) (30 C.F.R. 901.15). The approval of the 2015 amendment, however, has no impact on our determination of the issue presented in these petitions because "[t]he question of proper venue for an action is determined at the commencement of the action." Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001).

Conversely, the Commission and Black Warrior argue that the 2015 amendment did not require the approval of the OSM to become effective because, they claim, the 2015 amendment did not include any "changes to laws or regulations that make up the approved State program." See 30 C.F.R. § 732.17(g). Therefore, the question before this Court is whether the 2015 amendment, specifying the proper venue for an appeal of a decision of the Commission, constituted a change to Alabama's approved state program.

The Federal Surface Mining Act defines "state program" as "a program established by a State pursuant to section 1253 of this title to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of this chapter and regulations issued by the Secretary pursuant to this chapter." 30 U.S.C. § 1291(25). Section 1253(a) provides a list of seven components a proposed state program should include, but none of those components specifies the requirements for judicial review of a commission's decision, including venue. See 30 U.S.C. § 1253(a). The judicial-review requirements for state programs

are found in 30 U.S.C. § 1276(e),[5] which provides that an "[a]ction of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law." (Emphasis added.)

The emphasized language above merely requires that state programs provide for judicial review of commission decisions in "a court of competent jurisdiction," which Alabama's approved state program has done since its inception, by providing for judicial review of Commission decisions in "circuit court." Section 1276(e) does not mandate that a state program include a venue provision; the proper venue for a judicial review of a commission's decision is left to be determined "in accordance with State law." Indeed, when originally enacted, the Alabama Surface Mining Act did not include a venue provision, yet the OSM still found that it met the requirements for a state program. Likewise, the venue

[5]An additional list of criteria for approval or disapproval of state programs is provided in 30 C.F.R. § 732.15; 30 C.F.R. § 732.15(b)(15) requires state programs to "[p]rovide for judicial review of State program actions in accordance with State law, as provided in section 526(e) of the [Federal Surface Mining] Act." Section 526(e) is codified at 30 U.S.C. § 1276(e).

provision added by the 2015 amendment did not alter Alabama's approved state program and did not require the approval of the OSM.[6]

To hold otherwise would place form over substance and afford greater deference to the OSM than intended. The mere fact that this venue provision is codified within the Alabama Surface Mining Act, instead of elsewhere in the Alabama Code, does not remove the venue provision from state jurisdiction and place it in the realm of the OSM's oversight. As the United States Court of Appeals for the District of Columbia noted in In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 519 (D.C. Cir. 1981): "Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role."

The fact that the OSM treated the 2015 amendment as a proposed amendment to Alabama's state program does not make it so. Acknowledging the reciprocal nature of cooperative

[6]The added venue provision is also consistent with the applicable venue requirements in place at the time the Alabama Surface Mining Act was originally passed, before the enactment of the AAPA. See Alabama Youth Servs. Bd. v. Ellis, 350 So. 2d 405, 407 (Ala. 1977)(noting that the proper venue for an action against a State agency is in the county where its principal place of business is located).

federalism, the Commission voluntarily filed the 2015 amendments with the OSM to provide actual notice that the Alabama Legislature had modified its law to clarify the proper venue for appeals under the Alabama Surface Mining Act. In its submission to the OSM, the Commission even stated: "The effective date of this Act is one year from enactment." This amendment, although pressed through the federal bureaucratic process, did not require the approval of the OSM to be effective on a date other than the effective date established by the Alabama Legislature.[7] Therefore, the Jefferson Circuit Court erred in denying the Commission's and Black Warrior's motions for a change of venue.

Conclusion

The Commission and Black Warrior have demonstrated a clear legal right to have the underlying action transferred to

[7]The federal rules and regulations require the approval of the OSM only for "changes to laws or regulations that make up the approved State program." 30 C.F.R. § 732.17(g). Providing the OSM with notice of changes to state law that do not make up the approved state program is still advisable and ensures that the State remains compliant with the Federal Surface Mining Act, but, in the spirit of cooperative federalism, the effective date for such a change in state law should be the date determined by the Alabama Legislature, not the date of approval by the OSM.

the Walker Circuit Court. We grant the petitions and issue writs of mandamus directing the Jefferson Circuit Court to vacate its order denying the Commission's and Black Warrior's motions for a change of venue and to enter an order transferring the underlying action to the Walker Circuit Court.

1170222 -- PETITION GRANTED; WRIT ISSUED.

1170223 -- PETITION GRANTED; WRIT ISSUED.

Stuart, C.J., and Bolin, Main, and Mendheim, JJ., concur.

Parker, Shaw, and Bryan, JJ., dissent.

SHAW, Justice (dissenting).

The underlying action seeks judicial review of the issuance of a surface-coal-mining permit ("the permit") by the Alabama Surface Mining Commission ("the Commission") to Black Warrior Minerals, Inc. ("Black Warrior"). The action was filed in Jefferson County by the respondents, John T. Crane, Dan Jett, and Linda Jett ("the property owners"), who own property near the location that is the subject of the permit. The Commission and Black Warrior requested the Jefferson Circuit Court to transfer the action to Walker County; their request was denied.

The Commission and Black Warrior filed separate petitions for the writ of mandamus in the Court of Civil Appeals challenging the Jefferson Circuit Court's denial of their respective venue motions; those petitions were denied in a main opinion in which two judges concurred. Ex parte Alabama Surface Mining Comm'n, 254 So. 3d 904 (Ala. Civ. App. 2018). The Commission and Black Warrior now each separately petition this Court for a writ of mandamus. This Court today grants those petitions. For the reasons stated below, I believe that the petitions are due to be denied; I thus respectfully dissent.

The procedural history of this case is succinctly stated by the Court of Civil Appeals in Ex parte Alabama Surface Mining Commission:

> "On March 31, 2016, the Commission issued Black Warrior a surface-coal-mining permit, permit no. P-3987 ('the permit'). The property owners appealed the issuance of the permit to the Commission's Division of Hearings and Appeals; the issuance of the permit was affirmed on November 8, 2016. On December 2, 2016, the property owners filed, pursuant to § 9-16-79(1)d., Ala. Code 1975, a part of 'The Alabama Surface Mining Control and Reclamation Act of 1981' ('the Alabama Act'), § 9-16-70 et seq., Ala. Code 1975, a petition for review of the hearing officer's decision. The Commission took no action on the petition within 30 days of its filing, and, thus, the petition was deemed denied. See § 9-16-79(3)a., Ala. Code 1975.
>
> "On January 30, 2017, the property owners appealed to the Jefferson Circuit Court. On March 2, 2017, the Commission and Black Warrior filed motions to dismiss or, alternatively, to transfer the appeal to the Walker Circuit Court. All the parties briefed the issue whether the Walker Circuit Court or the Jefferson Circuit Court is the proper [venue] to hear the appeal. On June 28, 2017, the Jefferson Circuit Court denied the motions filed by the Commission and Black Warrior."

254 So. 3d at 906.

The issues raised in these petitions, which require this Court to determine the proper venue for the property owners' action seeking judicial review of the issuance of the permit, involve the interaction of the Alabama Surface Mining Control

and Reclamation Act of 1981, Ala. Code 1975, § 9-16-70 et seq. ("the Alabama Act"), with the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. ("the Federal Surface Mining Act").

The States "are not compelled ... to participate in the federal regulatory program in any manner whatsoever," Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981), and state laws that are inconsistent with the Federal Surface Mining Act are superseded by it. 30 U.S.C. § 1255(b). States may elect to enact their own regulatory programs ("state programs"), provided that state programs conform to the Federal Surface Mining Act and are approved by the federal government. The Federal Surface Mining Act also directs the promulgation of regulations "establishing procedures and requirements for preparation, submission, and approval of State programs." 30 U.S.C. § 1251(b).

The State of Alabama opted to create its own state program by enacting the Alabama Act in 1981. The Alabama Act states: "It is the intent of [the Alabama Act] to implement and enforce [the Federal Surface Mining Act] and the permanent regulations promulgated thereunder, as required for the state to retain exclusive jurisdiction over the regulation of

surface coal mining ...." Ala. Code 1975, § 9-16-71(b). The Alabama state program was conditionally approved by the Office of Surface Mining Reclamation and Enforcement ("the OSM"), with an effective date of May 20, 1982. 30 C.F.R. 901.10. Among other things, the Alabama Act created a process for obtaining permits to engage in certain mining operations; there is also a process for challenging the approval or disapproval of permits, first to a hearing officer and then to the Commission itself. See generally Ala. Code 1975, §§ 9-16-78, -79, and -88(e). As originally enacted, and before an amendment in 2015 discussed below, a party could then "secure a judicial review"[8] of a final decision of the Commission "by filing a notice of appeal in circuit court." § 9-16-79(4)b. Although no specific "circuit court" for purposes of venue was specified by the Alabama Act, caselaw at the time indicated that venue for actions against a State agency was proper in the county in which the agency maintained its principal place of business. Alabama Youth Servs. Bd. v. Ellis, 350 So. 2d 405, 407 (Ala. 1977), and Alabama Alcoholic Beverage Control

[8]Such judicial-review proceedings are alternately referred to in this dissent as "appeals" or "administrative appeals."

Bd. v. Owen, 54 Ala. App. 419, 420, 309 So. 2d 459, 460 (1975).

The Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq. ("the AAPA"), was also enacted in 1981 and, except for certain provisions not relevant here, became effective October 1, 1982, over six months after the OSM's conditional approval of the Alabama Act. Ala. Code 1975, § 41-22-27. The AAPA sets out in Ala. Code 1975, § 41-22-20, the procedure for judicial review of final decisions of administrative agencies. Section 41-22-20(b) provides that venue of such judicial proceedings is proper "either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters, or unless otherwise specifically provided by statute, in the circuit court of the county where a party ... resides."

In 1983, the legislature amended the Alabama Act. Act No. 1983-774, Ala. Acts 1983. Those amendments included an amendment to § 9-16-79(1)a. to provide that the procedures for hearings and appeals before the Commission "shall take precedence over the Alabama Administrative Procedure Act." That amendment was submitted to the OSM and approved with the effective date of March 2, 1984. Approval of Permanent

Program Amendments, 49 Fed. Reg. 7802 (March 2, 1984) (codified at 30 C.F.R. § 901.15).

In Ex parte Water Works Board of Birmingham, 177 So. 3d 1167 (Ala. 2014), a case factually similar to the instant matter, the Water Works Board of the City of Birmingham ("the Board") challenged the issuance of a surface-coal-mining permit and requested a hearing with a hearing officer. The hearing officer affirmed the issuance of the permit, and the Board filed a petition with the Commission for review of that decision. The petition was denied, and the Board appealed the decision by filing an action for judicial review in the Jefferson Circuit Court. 117 So. 3d at 1169.

The Commission filed a motion for a change of venue, arguing, among other things, that venue was proper in the Walker Circuit Court, where the Commission's principal office is located. Citing the general rule that the proper venue for an action against a State agency is the county of the agency's residence, and noting that the Commission was required by law to maintain its principal office in Walker County, see Ala. Code 1975, § 9-16-73(h), the trial court ordered that the case be transferred to Walker County. 177 So. 3d at 1169-70.

The Board sought mandamus review with this Court, arguing that venue in the Jefferson Circuit Court was appropriate under § 41-22-20(b) of the AAPA. This Court noted that the Alabama Act contained no provision "dictating to which circuit court a party may appeal" and further noted that "§ 9-16-79 lacks a venue provision." 177 So. 3d at 1171. Given the absence of a venue provision in the Alabama Act and the specific applicability of the procedures in the AAPA for seeking judicial review of administrative decisions, including the venue of such actions, see Ex parte Worley, supra, this Court held that § 41-22-20(b) applied: "Under the plain language of § 41-22-20(b), venue is proper in Montgomery County, Walker County (the county in which [the Commission] has its principal office), and Jefferson County (the county in which the Board has its principal office)." 177 So. 3d at 1173. Further, the Court stated that the language added to § 9-16-79(a)(1) in 1983--"[t]hese procedures shall take precedence over the Alabama Administrative Procedure Act"--did not mean that the AAPA could not be considered for purposes of venue:

> "The Legislature's use of the word 'precedence' in § 9-16-79 indicates that the AAPA may be considered but that the appeals procedure set forth in §

> 9-16-79 must be given precedence over any similar procedure in the AAPA. Section 9-16-79 does not state that the AAPA may not be considered in any circumstance ...."

177 So. 3d at 1173.

After the decision in Ex parte Water Works Board, the legislature amended the Alabama Act to specify the proper venue for judicial review or appeal of a decision by the Commission:

> "In 2015, [Ala. Code 1975,] § 9-16-79(4)b., a part of the Alabama Act, was amended by Act No. 2015-383, Ala. Acts 2015, to provide for judicial review of a final decision of the Commission 'in the circuit court of the county in which the commission maintains its principal office.'"

Ex parte Alabama Surface Mining Comm'n, 254 So. 3d at 907. This amendment (hereinafter referred to as "the 2015 amendment") became effective in June 2016; the underlying appeal was filed in the Jefferson Circuit Court by the property owners in January 2017.

In the instant case, under the plain language of the current version of § 9-16-79(4)b., proper venue of the property owners' action would appear to be in Walker County (and its circuit court), where the Commission maintains its

principal office.[9] The property owners, however, contend that, at the time they commenced their appeal in the Jefferson Circuit Court, the current version of § 9-16-79(4)b., as amended by the 2015 amendment, had not yet gone into effect.

As noted above, 30 U.S.C. § 1253 requires that state programs be approved by the OSM. Changes or amendments to a state program are approved through a process specified in a regulation, 30 C.F.R. § 732.17(g). It provides that changes must be submitted for approval to the Director of the OSM and that the changes do not take effect until they are approved. At the time the property owners commenced their action in the Jefferson Circuit Court, the 2015 amendment, specifying that venue in this case was proper in Walker County, had been submitted to the OSM but not yet approved; specifically, documents in the record indicate that, before the 2015 amendment was adopted, it was submitted to the OSM for an "informal review." After the act proposing the 2015 amendment was signed by the Governor, a "formal submission" of the act as an "amendment to the Alabama Regulatory Program" was

[9]See Ala. Code 1975, § 9-16-73(h) ("The commission shall establish and maintain its principal office in Jasper, Alabama ...."). There is no dispute that the Commission's principal office is located in Walker County.

submitted to the OSM by the Commission. The OSM "announc[ed] receipt of a proposed amendment to the Alabama regulatory program (Alabama program)," specifically, "revisions to [Alabama's] Program by clarifying that the venue for appeals ... resides in the Circuit Court of the county in which the agency maintains its principal office"; called for the submission of written comments on the "amendment"; and set a date for a public hearing "on the amendment." Alabama Regulatory Program, 80 Fed. Reg. 60107 (October 5, 2015).

At the time the underlying administrative appeal was filed in the Jefferson Circuit Court, the 2015 amendment had not yet been approved by the OSM. The property owners thus claim that it had not yet taken effect[10] and that venue was

[10]As the main opinion notes, see ___ So. 3d at ___ n.4, on April 27, 2018, after these mandamus petitions were filed, the OSM issued a decision approving the 2015 amendment. See Alabama Regulatory Program, 83 Fed. Reg. 18409 (April 27, 2018) (codified at 30 C.F.R. 901.15). The OSM explicitly characterized the 2015 amendment as an amendment to the state program. It noted that it had provided an opportunity for a public hearing and had received public comment on the amendment. It further stated that providing venue in the county where the Commission "maintains its principal office" would not violate the Federal Surface Mining Act. The approval of the 2015 amendment following the filing of these petitions has no impact on the determination required in these petitions because "[t]he question of proper venue for an action is determined at the commencement of the action." Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001). Instead, this

still governed by the holding in Ex parte Water Works Board, under which venue was proper in the Jefferson Circuit Court.

In their mandamus petitions, the Commission and Black Warrior maintain that the 2015 amendment was not actually part of the state program, that it did not require approval by the OSM under the Federal Surface Mining Act, and that it was thus effective under its own terms at the time the property owners filed their appeal in the Jefferson Circuit Court. The question before this Court concerns when the 2015 amendment took effect: upon the effective date specified by the legislature in it--June 2016--which was before the filing of the administrative appeal and which would render venue in the Jefferson Circuit Court improper, or upon approval by the OSM after the filing of the administrative appeal, which would mean that venue in the Jefferson Circuit Court was appropriate at the time the appeal was filed. See Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001) ("The question of proper venue for an action is determined at the commencement of the action.").

The Commission and Black Warrior maintain that the venue provision of § 9-16-79(4)b. is not actually part of the state

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Court is required to look to the law in effect at the time the property owners' action was commenced.

program and, thus, did not require the OSM's approval to become effective. Specifically, they argue that the state program itself deals only with the regulation of mining operations and that the 2015 amendment regulates only venue, which is a matter of traditional state judicial procedure and not mining.

I disagree. As noted above in Hodel, under 30 U.S.C. § 1253, a state that wishes to "assume exclusive jurisdiction" over the regulation of surface coal mining must submit to the Secretary[11] and have approved a "state program" demonstrating that it is capable of carrying out the provisions of the Federal Surface Mining Act. 30 U.S.C. § 1253(a). To be approved, the "rules and regulations" of the state program must be "consistent with regulations issued by the Secretary pursuant to" the Federal Surface Mining Act. 30 U.S.C. § 1253(a)(7). The Federal Surface Mining Act provides for judicial review of federal regulatory decisions. 30 U.S.C. § 1276(a). Concomitantly, it explicitly requires that there be a similar method of judicial review of state regulatory

[11]"Secretary" for purposes of the Federal Surface Mining Act refers to the Secretary of the Interior. 30 U.S.C. § 1291(23). As noted in note 2, supra, the Secretary acts through the OSM.

authority actions. Specifically, 30 U.S.C. § 1276(e) provides that an "[a]ction of the State regulatory authority pursuant to an approved state program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law." This mandates that a process of judicial review be part of Alabama's state program; that process was included in the Alabama Act and is now codified at § 9-16-79(4)b. Indeed, as part of its conditional approval of the Alabama Act in 1982, the OSM required certain conditions to be met related to the judicial-review process in administrative appeals, including requirements for preservation of the administrative record for review by the court and certain restrictions on the use of a de novo review process. Conditional Approval of the Permanent Regulatory Program, 47 Fed. Reg. 22030 (May 20, 1982). It thus cannot be said that the judicial-review process is not part of a state program.

It is clear that the 2015 amendment itself is part of the state program, despite the fact that it does not directly regulate mining operations. First, § 9-16-79 is a provision of the Alabama Act. The 2015 amendment is directed to the judicial procedure involved with challenging the administrative procedures of the Commission; such judicial

remedies, as noted above, are specifically required by the Federal Surface Mining Act to be part of a state program, despite the fact that those procedures may not directly impact mining operations. 30 U.S.C. § 1276(e).

The Commission contends that "matters of state judicial processes" are not, or should not be, subject to approval by the Secretary or the OSM. But this case does not involve a simple alteration of a state judicial procedure. The 2015 amendment was designed to remove administrative appeals related to the Commission's permit decisions from generally applicable state law (i.e., the AAPA) and to place them under a special form of regulation and in a special category. This was not an alteration of general law regarding state court proceedings, but a change to the state program--the Alabama Act and the mandated judicial remedies for challenging surface-mining decisions. These must be modeled to comply with federal law, and they require prior approval before they can be implemented.

It is further clear that both the Commission and the OSM believed that the 2015 amendment was a change to Alabama's state program. The Commission explicitly characterized it as such and submitted it for approval to the OSM. In turn, the

OSM likewise characterized it as an amendment to the state program and called for a public hearing and comment on it. In sum, I reject the argument that the 2015 amendment was disconnected to Alabama's surface-coal-mining regulatory scheme and state program and thus did not require approval. To the contrary, it is clearly a part of the program.

The Commission also argues that a "state program" refers solely to the regulation of mining operations, and not to judicial-review procedures. In support of that argument, it cites In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 519 (D.C. Cir. 1981), which states that "[a]dministrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role." The Commission argues: "[The Federal Surface Mining Act] merely requires an approved state program establish a process for judicial review of state program actions" and that "details of that process are not matters of federal concern." Although it is true that the Secretary has a limited role in the oversight of operating state programs, including the judicial-review functions of such programs, it is nevertheless clear that judicial-review functions are a part of the state program, even if those functions do not directly impact mining

regulation, and modifications to the program require approval. 30 U.S.C. § 1253, 30 C.F.R. § 732.17(g).

Black Warrior further contends that the OSM "has no power to decide whether it can preempt Alabama state law"; instead, it asserts, "a competent court (i.e., the Supreme Court of Alabama) must perform its own conflict determination, relying on the substance of state and federal law." However, the OSM's role in this situation does not "preempt" state law but, instead, ensures compliance with federal law. As noted above, 30 U.S.C. § 1253 requires that state programs be approved by the federal government. This would necessarily require that changes to a state program also be approved. The process for approval is spelled out in 30 C.F.R. § 732.17(g), which both requires the OSM to undertake a review of the change and mandates that the change not go into effect until that change is approved. The Federal Surface Mining Act requires that Alabama comply with that regulation. 30 U.S.C. § 1253(a)(7). Under that law and regulation, the 2015 amendment was not in effect when the underlying administrative appeal was commenced and did not control venue in this case.[12]

[12]Black Warrior argues that the OSM has no power to approve this particular change to the Alabama Act. In support

In conclusion, because the venue provision of § 9-16-79(4)b., as amended by the 2015 amendment, was not yet in effect when the underlying action was commenced, the trial court did not exceed its discretion in denying the Commission's and Black Warrior's motions for a change of venue. Therefore, the petitions for the writ of mandamus are due to be denied, and I must respectfully dissent.

Bryan, J., concurs.

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of this argument, it cites language in Alden v. Maine, 527 U.S. 706, 745 (1999), stating that Congress cannot abrogate a state's sovereign immunity in state-court proceedings, and Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468, 473 (1987), which recites that a state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued. But the underlying case in the Jefferson Circuit Court is not a suit against the State of Alabama to which a claim of immunity applies; instead, it is an administrative appeal. If it were a suit against the State for purposes of immunity, then it would be barred by Art. I, § 14, Ala. Const. 1901, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." The legislature would thus not have the power to create a judicial-review process in Alabama courts as required by 30 U.S.C. § 1276(e), and the state program itself would not--and the legislature could not make it--comply with the Federal Surface Mining Act.